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Nos. 98-1046, 98-1153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BELLSOUTH CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

U S WEST, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION AND AT&T CORP.

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QUESTION PRESENTED

Whether section 274 of the Telecommunications Act of 1996 — which imposes merely a structural separation requirement on the Bell Operating Companies and which expires on February 8, 2000 -- constitutes legislative punishment in violation of the Bill of Attainder Clause, U.S. Const. Art. I, § 9, or the constitutional requirement of separation of powers because it applies to those companies by name.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit are listed at BST Pet. ii.

Pursuant to Supreme Court Rule 29.6, respondents state as follows:

MCI Telecommunications Corporation is a wholly owned subsidiary of MCI Communications, Inc., and MCI Communications, Inc. is a wholly owned subsidiary of MCI WORLDCOM, Inc.

MCI WORLDCOM, Inc. has the following non-wholly-owned subsidiaries:

American Communications Services, Inc.
Cogni-Case, Inc.
Embratel Participacoes S.A.
General Communication Inc.
Genesys Telecommunications Laboratories, Inc.
News T Investments, Inc.
News Triangle Finance, Inc.
Portugal Telecom

AT&T Corp. has an equity or debt interest in the following publicly traded companies: Cablevision Systems Corporation, Interactive Network, Inc., and Telewest Communications PLC.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

LIST OF PARTIES AND AFFILIATES ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Background 2

B. Prior Proceedings 6

REASONS TO DENY THE PETITIONS 9

I. Certiorari Should Be Denied Because Section 274 Will Likely Expire Before the Court Can Rule on It. 10

II. The Court of Appeals Correctly Applied Settled Law in Rejecting the BOCs' Bill of Attainder Challenges. 11

CONCLUSION 20

TABLE OF AUTHORITIES

CASES **Page**

Bell Atlantic v. FCC, 119 S. Ct. 889 (1999) 1
BellSouth Corp. v. FCC, 144 F.3d 58 (D.C. Cir.), *petition for cert. filed*, 67 U.S.L.W. 3438 (U.S. Dec. 28, 1998) (No. 98-1046) 10
BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998) . . . . . *passim*
Brookpark Entertainment, Inc. v. Taft, 951 F.2d 710 (6th Cir. 1991) 14
Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) 13, 14, 15
De Veau v. Braisted, 363 U.S. 144 (1960) . 13, 14
Dehainaut v. Pena, 32 F.3d 1066 (7th Cir. 1994) 14, 15
Dent v. West Virginia, 129 U.S. 114 (1889) . . . 13
Flemming v. Nestor, 363 U.S. 603 (1960) 13
Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992) 14
Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866) 14
Hawker v. New York, 170 U.S. 189 (1898) 13
Katzenbach v. McClung, 379 U.S. 294 (1964) . 18
McMullen v. United States, 989 F.2d 603 (2d Cir. 1993) 14
Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 7, 11, 12, 16
Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872) 14
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 7, 11

TABLE OF AUTHORITIES -- Continued

Page

SBC Communications, Inc. v. FCC, 119 S. Ct. 889 (1999) 1
SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999) . . . . . *passim*
Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) 12, 15
Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 18
United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) 3
United States v. Brown, 381 U.S. 437 (1965) . . 14
United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984) 17
United States v. Lovett, 328 U.S. 303 (1946) . . 14
United States v. Western Electric Co., 592 F. Supp. 846 (D.D.C. 1984) 3
United States v. Western Electric Co., 673 F. Supp. 525 (D.D.C. 1987), *aff'd in relevant part*, 900 F.2d 283 (D.C. Cir. 1990) 3, 17
United States v. Western Electric Co., 894 F.2d 1387 (D.C. Cir. 1990) 4
United States v. Western Electric Co., 900 F.2d 283 (D.C. Cir. 1990) 3
United States v. Western Electric Co., 993 F.2d 1572 (D.C. Cir. 1993) 3
United States v. Western Electric Co., 12 F.3d 225 (D.C. Cir. 1993) 4

TABLE OF AUTHORITIES -- Continued

Page

United States v. Western Electric Co., 890 F. Supp. 1 (D.D.C. 1995) 3
United States v. Western Elec. Co., No. 82-0192 (HHG), 1996 WL 255904 (D.D.C. Apr. 11, 1996) 6
WMX Technologies, Inc. v. Gasconade County, 105 F.3d 1195 (8th Cir. 1997) 14

STATUTES and CONSTITUTION

47 U.S.C. § 271(a) 5
47 U.S.C. § 271(b)(2) 5
47 U.S.C. § 271(b)(3) 5
47 U.S.C. § 274(a) 5
47 U.S.C. § 274(b) 6
47 U.S.C. § 274(g)(2) 1, 6, 8, 10
47 U.S.C. § 274(h)(1) 5
47 U.S.C. § 274(h)(2) 5
Bill of Attainder Clause, U.S. Const. Art. I, § 9 . . . . . *passim*

LEGISLATIVE MATERIAL

Competitive Status of the Bell Operating Companies: Hearing on H.R. 3687 and H.R. 3800, Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong. 86 (Mar. 13, 1986) . 17

TABLE OF AUTHORITIES – Continued

Page

Telecommunications: The Role of the Department of justice: Hearing Before the House Committee on the Judiciary, 104th Cong. 66 (May 9, 1995) 17
H.R. Conf. Rep. No. 104-458 (1996) 4
S. Rep. No. 104-230 (1995) 4

ADMINISTRATIVE RULING

In re Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, First Report and Order and Further Notice of Proposed Rulemaking, 12 F.C.C.R. 5361 (1997) 6

MISCELLANEOUS

Common Carrier Bureau, FCC Report on Local Competition (Dec. 5, 1998) 4

STATEMENT OF THE CASE

In January, this Court denied multiple petitions for a writ of certiorari filed by the Bell Operating Companies ("BOCs") contending that the United States Court of Appeals for the Fifth Circuit erred when it held that § 274 and other provisions of the Communications Act, 47 U.S.C. §§ 271-275 (the "Special Provisions"), do not violate the Bill of Attainder Clause. *See SBC Communications, Inc. v. FCC*, 119 S. Ct. 889 (1999); *Bell Atlantic v. FCC*, 119 S. Ct. 889 (1999). In the instant petitions, the BOCs once again seek review of a decision of the Court of Appeals — this time the United States Court of Appeals for the District of Columbia Circuit — rejecting their bill of attainder challenge to § 274.[1] All three decisions from the Courts of Appeals to have addressed the BOCs' bill of attainder challenges to the Special Provisions have correctly applied this Court's settled jurisprudence and concluded that the Special Provisions are constitutional. Moreover, § 274, the *only* provision petitioners challenge in this case, expires on February 8, 2000. *See* § 274(g)(2). The instant petitions thus seek what would in all likelihood be an advisory opinion from this Court on a settled issue of constitutional law. The petitions therefore fail to meet any of this Court's requirements for certiorari and should be denied.

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[1]Petitioners also seek certiorari on the D.C. Circuit's unanimous rejection of their First Amendment challenge to § 274. *See* BST Pet. App. 18a-25a (rejecting BOCs' First Amendment challenge); *id.* at 25a (Sentelle, J., dissenting) (agreeing with the majority's First Amendment analysis and conclusion); *see also SBC Communications, Inc. v. FCC*, 154 F.3d 226, 246-47 (5th Cir. 1998) (rejecting BOCs' First Amendment challenge to § 274), *cert. denied*, 119 S. Ct. 889 (1999). Private respondents intervened below to defend § 274 only with respect to the bill of attainder issue. Accordingly, this Brief in Opposition will not address petitioners' First Amendment challenge.

A. Background.

The 20 BOCs — including petitioners BellSouth Corporation and U S WEST, Inc. — exercise monopoly control over local telephone service to more than 80% of America's homes and businesses. Originally, the BOCs were part of the integrated Bell System, and were affiliated with AT&T, which then monopolized the long distance market, and Western Electric, which monopolized the business of manufacturing telecommunications equipment.

The Bell System's dominance rested on the BOCs' control of local networks, which no other firm could afford to duplicate. Each local network consisted of lines and switches that connected all homes and businesses in a BOC's local service area. That network was used to provide local service, but it was also indispensable to long distance service. A long distance call initiated by a customer first traveled from the customer's premises on the BOC's local network to a point where it was handed off to AT&T's long distance facilities, which then transported the call to the recipient's local network for completion. Without access to the local network, no long distance carrier could provide service. BOC cooperation was therefore essential if companies such as MCI Communications, Inc. were to provide competitive long distance service. The same was true about other services (such as electronic publishing) that depended on access to the local network.

The BOCs were divested from AT&T as a result of a 1982 antitrust consent decree (the Modification of Final Judgment or "MFJ"). The MFJ settled an eight-year-old government antitrust suit. The decree was designed to remedy the anticompetitive effects of a single enterprise's ownership of both the "bottleneck" local exchange facilities and competitive long distance, manufacturing, and information services

businesses. The MFJ prohibited the BOCs from entering the markets for long distance telephone services, equipment manufacturing, information services (which included electronic publishing and alarm monitoring), and any nonregulated services.[2]

The administration of the MFJ fell to a single district judge who established a multi-stage procedure, unconstrained by deadlines, for adjudicating BOC requests to remove or modify the MFJ's restrictions. *See United States v. Western Elec. Co.*, 592 F. Supp. 846, 873 & nn.112-14 (D.D.C. 1984). Although the district court waived (at the BOCs' request) the restrictions for a number of peripheral activities where BOC control of the local network posed no threat, and although the district court eventually removed the constraints on information services and non-telecommunications businesses,[3] the court rejected all significant BOC requests to remove or narrow the core long distance and manufacturing restrictions. *See, e.g., United States v. Western Elec. Co.*, 673 F. Supp. 525, 551-52 (D.D.C. 1987) (denying waiver to provide long distance services to customers of their cellular, paging, and other mobile radio services), *aff'd in relevant part*, 900 F.2d 283, 301 n.18 (D.C. Cir. 1990); *United States v. Western Elec. Co.*, 890 F. Supp. 1, 6-8 (D.D.C. 1995) (granting waiver only on restrictive conditions the BOCs could not subsequently meet); *United States v. Western Elec. Co.*, 673 F. Supp. at 543-45 (denying a

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[2]*United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 227-28, 231, 232-34 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[3]*See United States v. Western Elec. Co.*, 900 F.2d 283, 305-10 (D.C. Cir. 1990) (affirming removal of general restriction and portion of information services restriction); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1582 (D.C. Cir. 1993) (affirming removal of remaining information services restriction).

BOC request to provide long distance services originating *outside* the States where they had local bottleneck monopolies); *United States v. Western Elec. Co.*, 894 F.2d 1387 (D.C. Cir. 1990) (affirming rejection of BOC request for authority to engage in design and development of equipment); *United States v. Western Elec. Co.*, 12 F.3d 225 (D.C. Cir. 1993) (affirming rejection of BOC request for authority to finance development of equipment by independent companies in exchange for royalties).

Unable to secure their objectives through the judicial process, the BOCs successfully petitioned Congress for what amounted to private legislation. In the Telecommunications Act of 1996 (the "1996 Act" or the "Act"), 47 U.S.C. §§ 251-261, the BOCs obtained the legislative relief they had long sought, in legislation that they enthusiastically supported. *See, e.g., BellSouth Corp. v. FCC*, 162 F.3d 678, 691 (D.C. Cir. 1998) ("*BellSouth II*") (noting that "BellSouth's Chairman applauded the Act"). More specifically, Congress accepted the BOCs' longstanding argument that the industry should not be governed by a consent decree administered by "a single Federal district court," S. Rep. No. 104-230, at 9 (1995), and fashioned a new legislative framework designed to open all telecommunications markets to competition. *See* H.R. Conf. Rep. No. 104-458, at 1 (1996). Thus, in § 601 of the Act, Congress provided that the BOCs would cease to be subject to the "restrictions and obligations" of the MFJ and would instead be subject to the "restrictions and obligations" of the Act. Congress also enacted §§ 251-253, which are designed to begin the process of opening local markets to vibrant competition.[4]

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[4]Despite the dismantling of state legal barriers to competitive entry, the BOCs in their regions continue to hold more than 97% of the local market. *See* Common Carrier Bureau, FCC Report on Local Competition (Dec. 5, 1998).

Congress also authorized immediate BOC entry into important segments of the long-distance market previously blocked off by the MFJ. *See, e.g.*, § 271(b)(2) (unconditionally allowing the BOCs immediately to begin providing long distance service anywhere in the country outside their local monopoly regions); § 271(b)(3) (permitting the BOCs immediately to begin providing "incidental interLATA services" such as commercial mobile services (*e.g.*, cellular), without any of the restrictions previously imposed by the MFJ). Moreover, although the Act maintained the core of the MFJ's in-region long-distance restrictions, it authorized lifting them upon a finding by the FCC that the BOC had satisfied certain conditions set forth in the statute. *See* § 271(a).

At the same time, Congress passed § 274, the provision at issue in the instant petitions. That section permits a BOC to "engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's . . . basic telephone service," but temporarily requires a BOC wishing to engage in that line of business to do so through a "separated affiliate" or an "electronic publishing joint venture." § 274(a) (BST Pet. App. 195a-96a).[5] The separated affiliate or joint venture must comply with a number of requirements — including maintaining separate books and observing

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[5]The Act defines electronic publishing to include "the dissemination, provision, publication, or sale" of "news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information." 47 U.S.C. § 274(h)(1) (BST Pet. App. 200a). Several types of services, including data processing, voice messaging, and video programming, are exempted from § 274's structural separation requirements. *See* § 274(h)(2) (BST Pet. App. 200a-02a).

prohibitions on overlapping directors and common ownership of property — designed individually and collectively to ensure separation. *See generally* § 274(b) (BST Pet. App. 196a-97a). Congress provided that § 274's restrictions expire on February 8, 2000, four years from the date of the passage of the Act. *See* § 274(g)(2) (BST Pet. App. 200a).

Immediately after the 1996 Act became law, the BOCs took advantage of § 601(a) to terminate formally the MFJ in the district court. The district court vacated the MFJ in a brief order entered in April 1996. *See United States v. Western Elec. Co.*, No. 82-0192 (HHG), 1996 WL 255904 (D.D.C. Apr. 11, 1996). Significantly, the BOCs did not question the constitutionality of § 274 or the other Special Provisions. Had any BOC done so, the MFJ court in that proceeding could not have terminated the MFJ without first determining whether those provisions are constitutional and, if not, whether they are severable from § 601(a) or the rest of the 1996 Act.

B. Prior Proceedings.

In February 1997, the FCC adopted a comprehensive report and order implementing, among other things, the "non-accounting requirements of . . . [§]274." *In re Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, First Report and Order and Further Notice of Proposed Rulemaking, 12 F.C.C.R. 5361, at ¶ 2 (1997) (BST Pet. App. 33a, 34a) (the "*Order*"). In the *Order*, the FCC rejected the BOCs' bill of attainder challenges to § 274, concluding that "the section 274 restrictions on BOC provision of electronic publishing services are temporary requirements aimed at protecting against improper cost allocation and discrimination by the BOCs." *Order* ¶ 39 (BST Pet. App. 55a). Noting that "in enacting the 1996 Act, Congress freed BOCs from the terms of an antitrust

consent decree," the FCC also found "no evidence, and BellSouth and U S West . . . offered none, that would support a finding that Congress enacted section 274 to punish the BOCs." *Id.*

In an opinion authored by Judge Williams and joined by Chief Judge Edwards, the D.C. Circuit affirmed. Citing this Court's decisions in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the D.C. Circuit rejected at the outset the BOCs' argument that the Bill of Attainder Clause "bars Congress from singling out a specified class of persons for burdens of any kind, regardless of whether those burdens can be viewed as punishments in any ordinary sense of the term." BST Pet. App. 8a. The Court of Appeals noted correctly that this Court has "insisted that the burden must be a punishment to qualify as a bill of attainder." *Id.* at 9a-10a (citing *Nixon*, 433 U.S. at 478-88).

To determine whether the challenged provision constituted "punishment," the D.C. Circuit conducted the "three necessary inquiries" prescribed by this Court: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish." BST Pet. App. 10a (quoting *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984)) (citations and internal quotations marks omitted). The D.C. Circuit concluded that the Special Provisions did not impose "punishment" under any of those inquiries.

Most important, the Court of Appeals rejected the BOCs' argument that § 274 falls within this Court's understanding of

"historical" punishments. Despite the BOCs' efforts to analogize § 274 to traditional employment debarments, the Court of Appeals properly recognized that "the analogy is very loose indeed." BST Pet. App. 12a. The Court of Appeals noted that § 274 does not even create a "line-of-business restriction," but instead "simply requires structural separation." *Id.* at 12a-13a. Section 274 would thus permit petitioner BellSouth, for example, to engage in electronic publishing through "a wholly-owned subsidiary" that could even "disseminate materials over the telephone lines of BellSouth's BOC subsidiaries, as long as it was kept separate from them in ways proscribed by § 274(b)." BST Pet. App. 13a. The Court of Appeals found that "[w]hile structural separation is hardly costless, neither does it remotely approach the disabilities that have traditionally marked forbidden attainders." *Id.* at 13a. As the Court of Appeals observed, § 274 is "less severe than the analogous pre-1991 MFJ provisions along several dimensions: it applies only to electronic publishing rather than to information services as a whole, it expires after five years rather than continuing indefinitely, and it mandates structural separation rather than complete exclusion." *Id.* at 16a.[6]

The D.C. Circuit also determined that Congress had a nonpunitive legislative purpose in enacting the provision. Judge Williams noted that § 274 "has the earmarks of a rather conventional response to commonly perceived risks of anticompetitive behavior," BST Pet. App. 14a, and is designed to "ensur[e] that no cross-subsidization or unfair competitive practices occur," *id.* (internal quotations omitted).

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[6]Although the Court's opinion stated that § 274's restrictions expire after "five" years, it is undisputed that those restrictions expire *four* years after the passage of the 1996 Act, on February 8, 2000. *See* § 274(g)(2) (BST Pet. App. 200a); *see also* BST Pet. App. 35a ("The requirements under section 274 expire on February 8, 2000.").

Judge Sentelle dissented. *Id.* at 25a-32a. The gravamen of his dissent was that, in light of what he concluded was "the history of treating line-of-business restrictions as punishment," § 274 constituted legislative punishment prohibited by the Bill of Attainder Clause. BST Pet. App. at 29a.

REASONS TO DENY THE PETITIONS

The Petitions for Certiorari should be denied. In January, this Court denied the BOCs' petitions for certiorari raising an identical bill of attainder challenge to § 274 of the Act. At the time this Court denied certiorari, the Court of Appeals in the instant case and two other panels of the Courts of Appeals had addressed the BOCs' bill of attainder challenges to the Special Provisions and all had rejected them. *See SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 889 (1999); *BellSouth II*, 162 F.3d 678. No intervening decision or event provides any basis for this Court to reach a different result now. Indeed, the case for review of the instant petitions is even weaker than was the case for reviewing the BOCs' prior petitions: petitioners here challenge *only* § 274, a provision that expires of its own accord on February 8, 2000, shortly after (or even before) this Court could render a decision on the merits.

Moreover, the decision of the D.C. Circuit does not merit review because it is consistent with the decisions of this Court and the Courts of Appeals, and is entirely correct. As the D.C. Circuit recognized, invalidating a provision under the Bill of Attainder Clause requires not merely specificity, but punishment. The BOCs' argument that § 274 is punitive depends primarily on two propositions: first, that the structural separation requirements imposed by § 274 are indistinguishable from employment bars on individuals; and second, that such employment bars automatically qualify as attainders

irrespective of whether their principal purpose is regulatory. Neither proposition is correct; § 274's restrictions do not "remotely approach" employment bars on individuals, both because § 274's restrictions apply only to regulated corporations, and because those restrictions merely limit the form of those corporations' participation in a particular market rather than prohibit that participation. Further, even genuine employment bars are not automatically regarded as punitive. Congress' evident non-punitive regulatory purpose here of preventing "cross-subsidization and unfair competitive practices" renders § 274 non-punitive. Accordingly, under this Court's settled jurisprudence, § 274 does not violate the Bill of Attainder Clause.

I. Certiorari Should Be Denied Because Section 274 Will Likely Expire Before the Court Can Rule on It.

Conspicuously absent from BellSouth's petition for certiorari is any reference to § 274(g)(2). That provision provides: "Sunset. — The provisions of this section shall not apply to conduct occurring after 4 years after the date of enactment of the Telecommunications Act of 1996." BST Pet. App. 200a. By their own terms, then, the structural separation and other requirements contained in § 274 expire on February 8, 2000. By the time this case was fully briefed, argued, and ready for this Court's decision, the challenged provisions would be about to expire — if they had not already expired — rendering this Court's opinion in effect an advisory one.[7] That

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[7]Despite the fact that § 274's allegedly punitive restrictions were to expire after just four years, the BOCs waited for over a year before challenging the constitutionality of that provision in any court. *See* Petition for Review (filed Feb. 28, 1997), *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir.), *petition for cert. filed*, 67 U.S.L.W. 3438 (U.S. Dec. 28, 1998) (No. 98-1046); *SBC Communications, Inc.*, 154 F.3d at 232 (noting that

alone demonstrates that the issues presented in the petitions are not sufficiently important to merit this Court's review.

II. The Court of Appeals Correctly Applied Settled Law in Rejecting the BOCs' Bill of Attainder Challenges.

As noted, three panels of the Courts of Appeals have now considered the BOCs' bill of attainder challenges to the Special Provisions, and all three, including the D.C. Circuit, have rejected them. The unanimity among the Courts of Appeals belies petitioners' suggestion that the decision below is "troubling," BST Pet. 20, "misguided," *id.* at 16, "dangerous," *id.*, "radical[]," U S West Pet. 18, or any of the other hyperbole petitioners employ.

1. It is well established that "laws that impose a duty or liability upon a single individual or firm are not on that account invalid," because "the Bill of Attainder Clause . . . requires not merely 'singling out' but also punishment." *Plaut*, 514 U.S. at 239 n.9. It is also well established that not every legislatively imposed disability constitutes "punishment." *Nixon*, 433 U.S. at 476 n.40 ("[O]ne who complains of being attainted must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct"). Some disabilities — such as execution, imprisonment, or banishment — are inherently punitive in light of their "type and severity," and qualify as "punishment" for Attainder Clause purposes irrespective of whether they also serve prophylactic public purposes such as incapacitation or deterrence. Outside that narrow category, however, the Court has made clear "the need to examine the purposes served by a

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SBC filed suit challenging § 274 on July 2, 1997, over sixteen months after passage of the 1996 Act, and that Bell Atlantic Corp. and U S West intervened thereafter).

purported bill of attainder in determining whether it in fact represents a punitive law." *Id.* That is why the second of the three inquiries the Court described as "necessary" in *Selective Service System v. Minnesota Public Interest Research Group* requires evaluation of "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." 468 U.S. 841, 852 (1984) (internal quotations omitted).

The BOCs contend that employment bars on individuals fall within the narrow category of inherently punitive disabilities, and they analogize corporate line-of-business restrictions to those employment bars. *See* BST Pet. 15-18; U S West Pet. 18-20. They would treat such restrictions, in other words, as the corporate equivalent of a legislative death penalty imposed on an individual. Even if § 274's separated affiliate requirements imposed a line-of-business restriction (which they do not), and even if line-of-business restrictions on a corporation were analogous to employment bars on individuals (which they are not), the BOCs' arguments would be without merit because employment bars are not inherently punitive. In their effort to rework bill of attainder jurisprudence, the BOCs rely principally on *Nixon* — a case rejecting an Attainder Clause challenge. To be sure, *Nixon* indicated that "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations" might qualify as punishment (especially where "employed against those legislatively branded as disloyal"), 433 U.S. at 474; but *Nixon* did not suggest (much less hold) that such restrictions are automatically classified as punitive. To the contrary, the Court made clear that a "functional" analysis was necessary, and supported that directive by citing the very case the BOCs here assert established an automatic rule of invalidation for restrictions on employment. *Id.* at 475-76 (citing *Cummings v.*

Missouri, 71 U.S. (4 Wall.) 277, 319-20 (1866)).

Cummings itself made clear that restrictions on individuals' pursuit of a profession "may" or may not be punitive, depending on "the circumstances attending and *the causes of* the deprivation." 71 U.S. (4 Wall.) at 320 (emphasis added). The Court's holding that the restrictions at issue were punitive resulted from a careful analysis of whether they were "appropriate as a condition of allowing the exercise of the profession[]," and concluding that there was "no connection" between the restriction imposed and any nonpunitive regulatory purpose. *Id. See also Hawker v. New York*, 170 U.S. 189, 198 (1898) (noting the *Cummings* Court's conclusion that "these oaths had no relation to the fitness or qualification of the two parties"); *Dent v. West Virginia*, 129 U.S. 114, 128 (1889) (same). Thus, far from establishing a rule of automatic invalidation, the authority invoked by the BOCs unambiguously establishes that a restriction on the pursuit of a profession may or may not be punitive, depending on whether it can be justified based on nonpunitive regulatory purposes.

This Court's precedents have always reflected that distinction. In *De Veau v. Braisted*, 363 U.S. 144 (1960), for example, the Court held that a restriction on the ability of convicted felons to hold office in any waterfront labor organization did not constitute punishment for Attainder Clause purposes. As *De Veau* explained, the dispositive inquiry is "whether the legislative aim was to punish th[e] individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation." 363 U.S. at 160. *Accord Flemming v. Nestor*, 363 U.S. 603, 614 (1960) (restriction not punishment where "the source of [the] legislative concern can be thought to be the activity . . . from which the individual is barred, . . . even though it may bear harshly upon one affected"). In contrast,

the only employment bans found by this Court to be punitive under a bill of attainder analysis have been bans imposed on suspected subversives or traitors. *See United States v. Brown*, 381 U.S. 437 (1965) (communists); *United States v. Lovett*, 328 U.S. 303 (1946) (same); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1872) (same); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) (members of the Confederacy); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (same). In such situations, the decision to apply the restrictions to suspected traitors, and no others, severely undermined any effort to defend the restrictions on the ground that they sought to regulate the calling rather than punish the person.

In the infrequent instances when Attainder Clause issues have arisen, the Courts of Appeals have applied these settled principles in a straightforward manner that does not remotely suggest a need for guidance from this Court. *See, e.g.*, *BellSouth II*, 162 F.3d at 684; *SBC Communications, Inc.*, 154 F.3d at 241; *McMullen v. United States*, 989 F.2d 603, 612 (2d Cir. 1993); *Brookpark Entertainment Inc. v. Taft*, 951 F.2d 710, 717 (6th Cir. 1991); *Dehainaut v. Pena*, 32 F.3d 1066, 1071 (7th Cir. 1994); *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195, 1202 (8th Cir. 1997); *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 727 (9th Cir. 1992). As the D.C. Circuit below noted, quoting Professor Tribe's treatise, "'Even measures historically associated with punishment — such as permanent exclusion from an occupation — have been otherwise regarded when the nonpunitive aims of an apparently prophylactic measure have seemed sufficiently clear and convincing.'" BST Pet. App. 13a-14a (quoting Laurence H. Tribe, American Constitutional Law § 10-5, at 655 (2d ed. 1988)). Similarly, the Seventh Circuit has previously held that "[e]ven where a fixed identifiable group . . . is singled out and a burden traditionally associated with punishment — such as permanent exclusion from an

occupation — is imposed, the enactment may pass scrutiny under bill of attainder analysis if it seeks to achieve legitimate and non-punitive ends and was not clearly the product of punitive intent." *Dehainaut v. Pena*, 32 F.3d at 1071. In short, courts and commentators have uniformly recognized that what petitioners now characterize as a "misguided mode of analysis," BST Pet. 16, is precisely the analysis that this Court in *Selective Service System* described as "necessary." 468 U.S. at 852 (requiring inquiry into whether the provisions "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes") (internal quotations omitted). It is thus hardly surprising that the D.C. Circuit in the case at bar, the Fifth Circuit in *SBC Communications, Inc.*, and the D.C. Circuit in *BellSouth II* all analyzed the constitutionality of the Special Provisions in the same manner and reached the same result.

2. Moreover, the structural separation requirements imposed by § 274 are at least two steps removed from the employment bans on individuals that this Court has found may (or may not) be punitive. First, a line-of-business restriction on a corporation does not implicate the same individual liberty interests as employment restrictions on an individual, *cf. Cummings*, 71 U.S. at 321 ("The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone."), particularly when that corporation participates in a heavily regulated industry in which licensing requirements and entry tests are commonplace. *See* BST Pet. App. 12a (noting that this Court "in *Brown* strongly suggested that line-of-business restrictions pose no bill of attainder concerns");

BellSouth II, 162 F.3d at 688 (noting that "we do not endorse" the BOCs' assumptions that "the restrictions of § 271 [are] equivalent to an employment bar").

Second, and more important, § 274 does not impose a line-of-business restriction; instead, it "simply requires structural separation." BST Pet. App. 13a. Indeed, § 274 makes abundantly clear that each BOC may not only engage in electronic publishing, it may do so even over its own local telephone network, as long as it complies with the separation requirements imposed by § 274. *See* BST Pet. App. 13a ("BellSouth itself could enter the electronic publishing business provided it observed the norms of separation from its BOCs."); *BellSouth II*, 162 F.3d at 683 ("§ 274 allows the BOCs to provide electronic publishing if they do so through a separate affiliate"). The D.C. Circuit was thus correct to conclude that § 274's structural separation requirements do not "remotely approach the disabilities that have traditionally marked forbidden attainders." BST Pet. App. 13a.

3. Nor is there merit to the BOCs' suggestion that the Act's exclusion of GTE and others from § 274's structural separation requirements undermines Congress' non-punitive purposes. BST Pet. 18-20. The BOCs' arguments along these lines must be viewed with skepticism, for as this Court has noted, "[h]owever expansive the prohibition of bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress . . . that legislatively burdens some persons or groups but not all plausible individuals." *Nixon*, 433 U.S. at 471 (footnote omitted).

The D.C. Circuit correctly recognized that Congress' decision to treat the BOCs differently from other local carriers is "neither suggestive of punitive purpose nor particularly

suspicious." BST Pet. App. 17a; *see also SBC Communications, Inc.*, 154 F.3d at 243 ("the mere fact that the Special Provisions are limited in application to the BOCs (and thus do not cover other LECs with substantial local market power, like GTE) does not cast substantial doubt on the fit of this tailoring"). Although GTE and the nation's remaining local telephone companies are also monopolies, they have operations that are geographically dispersed, serve overwhelmingly rural and suburban areas, or are far smaller. For these reasons, federal courts and the United States Department of Justice have long concluded that the BOCs should be treated differently from all other local carriers because their massive, concentrated monopoly facilities gave them an ability to discriminate and cross-subsidize not shared by other local carriers — including GTE.[8] *See* BST Pet. App.

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[8] *See, e.g., Competitive Status of the Bell Operating Companies: Hearing on H.R. 3687 and H.R. 3800, Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 86 (Mar. 13, 1986) (testimony of Douglas H. Ginsburg, Assistant Attorney General) ("The GTE telephone subscribers are not only many fewer in number than any of the RBOC's, but they are scattered geographically around the country."); *id.* at 87 (noting the benefit to "being able to compare, for the local public service commission, the presentations made by one company as compared with another in the same state, so that significant discrepancies in their cost claims can be identified"); *Telecommunications: The Role of the Department of Justice: Hearing Before the House Committee on the Judiciary*, 104th Cong. 66 (May 9, 1995) (testimony of Anne K. Bingaman, Assistant Attorney General) (relying on same distinction to explain "why the BOCs were subject to the line-of-business restrictions while GTE was allowed to offer long distance services through a separate subsidiary"); *see also United States v. GTE Corp.*, 603 F. Supp. 730, 753 (D.D.C. 1984) (concluding that GTE "lacks the vast market domination . . . that would enable it to engage in anticompetitive practices irrespective of injunctions and separate affiliate provisions"); *United States v. Western Elec. Co.*, 673 F. Supp. 525, 549 (D.D.C. 1987) (expressly rejecting the argument that the BOCs were indistinguishable from GTE and that the MFJ's line of business

17a (noting that the concentration of the BOCs' facilities gives them a greater opportunity to cross-subsidize and that the absence of "benchmarks" makes that cross-subsidization harder to detect); *SBC Communications, Inc.*, 154 F.3d at 243 (same).[9]

4. Finally, the BOCs suggest that their contention that § 274 is punitive must be considered without reference to the context in which § 274 was passed and, in particular, without reference to the substantial benefits bestowed by the 1996 Act. BST Pet. 22 n.13. The BOCs' desperation to excise § 274 from its context demonstrates how devastating that context is to claims that § 274 is punitive. To be sure, as noted above, *see supra* p. 8, § 274 reimposes some of the original MFJ restrictions that had been lifted subsequently by the MFJ court. But, as the D.C. Circuit observed, the BOCs' claim that § 274 imposes punishment is "undermined by § 274's placement in an Act that as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ." BST Pet. App. 14a (emphasis in original); *see also SBC Communications, Inc.*, 154 F.3d at 244 ("[W]e conclude that the Special Provisions are not punitive because they were part of a larger quid pro quo. . . . For example, although the information services restriction lifted under the MFJ was partially reimposed under § 274, the BOCs were immediately freed, by operation of § 601(a)(1) and

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restrictions thus should be removed), *aff'd in part and rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990).

[9]BellSouth also chastises Congress for failing "to make any such finding to support its alleged 'regulatory' purpose." BST Pet. 19. But as this Court has often noted, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994); *see also Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) (noting, in Commerce Clause context, that "no formal findings were made, which of course are not necessary").

the other Special Provisions, from existing MFJ restrictions on their ability to offer incidental and out-of-region long distance service."). "[T]he Special Provisions," as the Fifth Circuit concluded, "represent a hard-fought compromise on a massive issue of public policy which, in the end, contained both good and bad elements for the BOCs"; a "legislative quid pro quo on this level simply cannot be punitive for attainder purposes." 154 F.3d at 244.[10]

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[10]The BOCs also suggest that the long distance provisions of the 1996 Act "can hardly be considered 'benefits' for the BOCs." BST Pet. 22 n.13. That contention is nonsense. *See, e.g.*, *BellSouth II*, 162 F.3d at 691 ("as a qualitative matter, the BOCs are no worse off under § 271 than they were under the MFJ; and there are many who think their position has vastly improved"); BST Pet. App. 14a (noting that the Act "as a whole *relieves* the BOCs of several of the burdens imposed by the MFJ") (emphasis in original); *SBC Communications, Inc.*, 154 F.3d at 244 (noting the substantial long distance benefits bestowed "by operation of § 601(a)(1) and the other Special Provisions").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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